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AT SEATTLE  
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WESTERN DISTRICT OF WASHINGTON  
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BY

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

IN RE: PHENYLPROPANOLAMINE  
(PPA) PRODUCTS LIABILITY  
LITIGATION,

MDL NO. 1407

This document relates to:

See Appendix A

ORDER OF DISMISSAL WITH  
PREJUDICE FOR FAILURE TO  
COMPLY WITH CMO 6

THIS MATTER comes before the court on the motion for dismissal with prejudice for failure to comply with court-ordered discovery filed by defendants Chattem, Inc. and The Delaco Company (collectively "defendants"). Having reviewed the pleadings filed in support of and in opposition to this motion, the court finds and rules as follows:

I. BACKGROUND

On March 18, 2002, the court entered Case Management Order ("CMO") 6, in which the court set a schedule and protocol for conducting all case-specific fact discovery within MDL 1407. Specifically, CMO 6 requires each plaintiff in every case to complete a Plaintiff's Fact Sheet ("PFS") and serve it upon



1 defendants within forty-five days of receipt of the PFS. CMO 6  
2 also provides that, should a plaintiff fail to serve a PFS within  
3 the time allowed, defendants shall send a warning letter and move  
4 for appropriate relief if plaintiff fails to respond within  
5 thirty days after the warning letter is sent.

6 Defendants now move pursuant to Federal Rules of Civil  
7 Procedure 37 and 41 to dismiss the plaintiffs identified in  
8 Appendix A of this order for failure to comply with CMO 6. The  
9 only opposition to defendants' motion was in the form of an  
10 omnibus opposition to any and all motions to dismiss for failure  
11 to comply with court-ordered discovery.

## 12 II. DISCUSSION

13 Before dismissing a case for non-compliance with court-  
14 ordered discovery, the court must weigh five factors: (1) the  
15 public's interest in expeditious resolution of litigation; (2)  
16 the court's need to manage its docket; (3) the risk of prejudice  
17 to the defendants; (4) the public policy favoring disposition of  
18 cases on their merits; and (5) the availability of less drastic  
19 sanctions. Malone v. United States Postal Serv., 833 F.2d 128,  
20 130 (9th Cir. 1987).

21 Most of the plaintiffs subject to defendants' motion to  
22 dismiss had a due date of no later than December 2, 2002 for the  
23 submission of their fact sheets.<sup>1</sup> See Defs' Mot., Ex. 1. Defen-  
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25 <sup>1</sup> A number of plaintiffs had due dates as early as May 6,  
26 2002, while three plaintiffs had January 13, 2003 or April 25,

1 dants sent warning letters to plaintiffs asking for completed  
2 fact sheets. Id. Plaintiffs' affirmations were due by no later  
3 than June 11, 2003. Id. Again, defendants sent plaintiffs  
4 warning letters asking for the affirmations. Id.

5 Plaintiffs proffer a variety of excuses for their failure to  
6 comply with CMOs 6 and 13, including, inter alia, the difficulty  
7 in locating clients, the debilitating nature of the injuries at  
8 issue, and their obligations under CMOs 13 and 15. Additionally,  
9 five plaintiffs (Margaret Black, Louis Doherty, Dorothy Warren,  
10 Florence Weiss, and Theodore Wells, all from Everidge, et al. v.  
11 Bayer Corp., No. C02-1858) have submitted fact sheets and/or  
12 affirmations. However, those individuals submitted fact sheets  
13 and/or affirmations only *after* defendants filed their motion to  
14 dismiss. Moreover, one individual submitted only an affirmation.  
15 At no time prior to the filing of defendants' motion did any of  
16 the plaintiffs at issue request additional time in which to  
17 complete a PFS from either defendants or the court. Also, the  
18 court notes that plaintiffs' CMO 13 and 15 obligations stem from  
19 their own choice to file mass-joinder cases against numerous  
20 defendants.

21 Accordingly, the court finds that dismissal is appropriate  
22 in light of the factors set forth in Malone. First, both the  
23 public's interest in the expeditious resolution of litigation and  
24 the court's need to manage its docket dictate dismissal. The

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26 2003 due dates. See Defs' Mot., Ex. 1.

1 cases subject to this order have been on file for close to or  
2 over a year. During that time, plaintiffs have not moved their  
3 cases forward. Such lack of diligence does not serve the public  
4 interest in expeditious resolution of litigation. See Yourish v.  
5 California Amplifier, 191 F.3d 983, 990 (9th Cir. 1999) ("dis-  
6 missal in this instance serves the public interest in expeditious  
7 resolution of litigation as well as the court's need to manage  
8 the docket because Plaintiff's noncompliance has caused the  
9 action to come to a complete halt, thereby allowing Plaintiff to  
10 control the pace of the docket rather than the Court").

11 Second, even for the few individuals who belatedly complied  
12 with CMO 6, the unreasonable delay in completing the fact sheets  
13 prejudices the defendants' ability to proceed with the cases  
14 effectively. The PFS is designed to give each defendant the  
15 specific information necessary to defend the case against it.  
16 Without that discovery device, a defendant is unable to mount its  
17 defense because it has no information about the plaintiff or the  
18 plaintiff's injuries outside the allegations of the complaint.  
19 The unreasonable delay in producing this information, therefore,  
20 severely prejudices the defendants, warranting dismissal.  
21 Pagtalunan v. Galaza, 291 F.3d 639, 642-43 (9th Cir. 2002).

22 Third, inasmuch as the disposition of cases should be on the  
23 merits, here, in light of the inability of most of the named  
24 plaintiffs to provide any information regarding the critical  
25 elements of their claims, it is impossible to dispose of the  
26 cases on the merits. Plaintiffs are uniquely in the possession

1 of the information being sought. Their inability or unwilling-  
2 ness to furnish this information in a timely fashion is not  
3 excusable. See In re Exxon Valdez, 102 F.3d 429, 433 (9th Cir  
4 1996) ("policy [of disposing cases on their merits] lends little  
5 support to appellants, whose total refusal to provide discovery  
6 obstructed resolution of their claims on the merits.")

7 Last, there are no less drastic sanctions remaining. All of  
8 the named plaintiffs received warning letters from defendants.  
9 These letters prompted no response. The court already imposed  
10 the sanction of preventing remand of the cases where discovery  
11 requirements have not been met. See CMO 10 ¶ 2 (Nov. 21, 2002).  
12 The court also ordered that the time for completing case-specific  
13 discovery will not begin to run until a substantially complete  
14 PFS has been provided to defendants. Id. ¶ 3. And now, even at  
15 the doorstep of dismissal, many of the named plaintiffs still  
16 fail to comply with CMO 6. Where the court has been lenient and  
17 provided plaintiffs with second and third chances following  
18 procedural defaults, "further default[] may justify imposition of  
19 the ultimate sanction of dismissal with prejudice." Malone, 833  
20 F.2d at 132 n.1 (quoting Callip v. Harris County Child Welfare  
21 Dep't, 757 F.2d 1513, 1521 (5th Cir. 1985)).

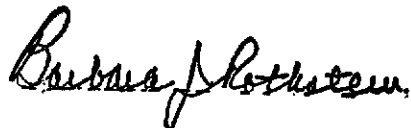
22 Accordingly, the court finds it appropriate to dismiss  
23 plaintiffs' claims against all defendants with prejudice.  
24 Defendants' motion to dismiss for failure to comply with court-  
25 ordered discovery is GRANTED. The claims by the plaintiffs  
26 listed in Appendix A are DISMISSED against all defendants with

ORDER

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1 prejudice.

2 DATED at Seattle, Washington this **27** day of **OCTOBER** 2003.

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5 BARBARA JACOBS ROTHSTEIN  
6 UNITED STATES DISTRICT JUDGE  
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## Appendix A

<u>Case name</u>	<u>Case Number</u>	<u>Plaintiff name</u>
Fife, et al. v. American Home Products Corp., et al.	C01-2144	Bailey, Lawrence Belisle, Marvin S. Bourgeois, Delores Brown, Vanessa Burras, Edward A. Davis, Gail G. Firsthly, Rachel Hilliard, Leo Johnson, Regina Prentice, Rose West, Doris Young, E.C.
Bustamante v. American Home Products Corp., et al.	C02-519	Bustamante, Joaquin
Everidge, et al. v. Bayer Corp., et al.	C02-1858	Black, Margaret Brown, Tajalena Carter, Kendrell Clanton, Leonard Doherty, Louis Dorsey, Jacqueline Hagan, Joan James, Cheryl Jessie, Bobby Scott, Shirley Warren, Dorothy Weiss, Florence Wells, Theodore
McCullough, et al. v. American Home Products Corp., et al.	C02-2595	Businelle, Brenda McCullough, Ellen
Arizmendi v. American Home Products Corp., et al.	C02-531	Arizmendi, Maria
Banks v. American Home Products Corp., et al.	C02-513	Banks, Leslie